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The U.S. Supreme Court NINE, the NCAA NIL!

After several trademark rulings in the 2020 term, the U.S. Supreme Court issued only one decision this past term that affects trademarks. But *National Collegiate Athletic Association v. Alston*, No. 20-512 (June 21, 2021), was an impactful decision. Some have characterized Justice Gorsuch's unanimous decision (9-0) as one of the most significant sports law decisions in U.S. history. And, although Alston is an antitrust case, it implicates trademark rights that student-athletes may have in their names, images and likenesses (NIL).

Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment and raise money from alumni. That profitable enterprise relies on "amateur" student-athletes who compete under rules that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules. Against this backdrop, a class of current and former student-athletes (named by former West Virginia football running back Shawne Alston) brought an antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate Section 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. § 1.

Following a bench trial, the district court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, however, the district court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed in full. Unsatisfied with that result, the NCAA asked the U.S. Supreme Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes did not renew their across-the-board challenge and, therefore, the Court did not consider the rules that remain in place. The Court considered only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court upheld the district court's injunction as consistent with established antitrust principles. Pursuant to the Supreme Court's holding, the NCAA rules will require modification or outright excision.

What is the practical effect of the Court's decision and how does it impact a student-athlete's rights in their NIL? First, the decision is narrowly focused on "education-related benefits." In that context, colleges and universities can now provide more extensive benefits than current NCAA regulations allow. Education-related benefits are fairly closely tied to what any college student might need and appreciate: reimbursements for computers and other equipment, free tutoring, paid internships, cash awards for academic achievement and the like. (Note the inherent ambiguity, however, in that definition: Who is to say whether an athlete should have an inexpensive computer or an expensive computer? A video monitor or a video system that allows high-quality streaming of lectures and can serve as a gaming device and home entertainment system? A $5,000 internship or a $50,000 internship?) The decision does not directly address the larger issue of pay-for-play or other big-picture issues with college athletes.

But the decision seems to be a harbinger for the NCAA of things to come, especially with the NIL movement. NIL rights encompass a bundle of rights also frequently called an individual's right to publicity, but including trademark rights. Ordinarily, any person may use his or her NIL for commercial or promotional purposes. Commercial purposes include accepting money in exchange for being featured in advertisements or endorsing products. Promotional purposes include promoting their own public appearances, brands or companies. Previously, the NCAA prohibited student-athletes from profiting from the use of their NIL for commercial and many promotional purposes, forfeiting their rights as a term or condition by signing their scholarship agreements and as a requirement for eligibility to participate in intercollegiate athletics.

U.S. Senate committees have recently held several hearings on NIL (and other college athletics issues) to examine federal NIL proposals. Over the past few years, governors in 28 states have signed legislation or issued executive orders that allow student-athletes to profit from the use of their NIL. Nineteen states recently passed legislation (which differs significantly from state to state) granting NIL rights to their student-athletes. The laws of six of those states, including Alabama, Florida, Georgia, Mississippi, New Mexico and Texas, went into effect on July 1. Schools in those states have been able to tell their athletes with confidence about NIL opportunities, creating an immediate imbalance that was already being exploited in recruiting.

A couple of days after the *Alston* decision, there was a hearing in the case of *House v. NCAA*, in which the plaintiffs are requesting that the NCAA not be allowed to have NIL restrictions on student-athletes. The NCAA's motion to dismiss that case was denied. On July 26, an amended complaint was filed to combine the case and another case into one consolidated action titled *In re College Athlete NIL Litigation*. The filing also adds new admissions from the NCAA and other defendant representatives that allowing NIL is a good thing.

Thus challenged by both legislators and the courts, the NCAA has had to act. In many ways, the NCAA is ceding its authority in the NIL area to the individual schools and conferences themselves, even in states without NIL laws. On June 23, the NCAA announced that it had suspended its rules prohibiting college athletes from profiting from their NIL, opening the door for them to sign paid sponsorship and endorsement deals.

On July 30, the NCAA said it would convene a special constitutional convention this November "to reimagine aspects of college sports so the association can more effectively meet the needs of current and future college athletes." The redraft of the constitution will be led by a 22-person committee. Specifically, the committee is going to examine the continued role of the organization as a national oversight and regulatory body for all major college athletics as compared to what must be left to individual schools and conferences. "This is not about tweaking the model we have now," NCAA President Mark Emmert said in a statement on July 30. "This is about wholesale transformation so we can set a sustainable course for college sports for decades to come. We need to stay focused on the thing that matters most – helping students be as successful as they can be as both students and athletes." Decentralization may be necessary to avoid more antitrust lawsuits. The college athletes in the *Alston* case had argued that rules set at the conference level may not raise the same antitrust concerns, as one conference would not have market power. In other words, the conferences would compete against one another.

Meanwhile, thousands of student-athletes have already taken advantage of the NIL opportunities available to them since July 1. They have entered agreements with clothing brands, beverage companies, restaurants, cell phone companies, video game platforms and other national and local retailers. Unilever plans to spend $5 million over the next five years in collaboration with college athletes promoting the deodorant brand Degree, and Alabama's presumptive starting quarterback has already earned close to $1 million, according to the team's coach.

Student-athlete compensation is a volatile and complex issue. Actually, it is a series of issues, including the rights to student-athlete trademark rights in their NIL. The issues are emerging just as higher education, including its athletic programs, struggles to emerge from the extraordinary losses suffered during the COVID-19 pandemic. Colleges and universities, athletic programs, individual team sports and more than 450,000 student-athletes are facing a transition that will change the landscape of college sports and the student-athlete experience as we know it.

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